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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12
77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY and KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

FILED ON BEHALF OF CHARTER OIL COMPANY, CLARK OIL & REFINING CORPORATION, DERBY REFINING COMPANY, HUDSON OIL COMPANY, INC., ROCK ISLAND REFINING COMPANY, INC., VICKERS PETROLEUM CORPORATION, AND UNITED REFINING COMPANY

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Charter Oil Company, Clark Oil & Refining Corporation, Derby Refining Company, Hudson Oil Company, Inc., Rock Island Refining Company, Inc., Vickers Petroleum Corporation, and United Refining Company hereby move, pursuant to Rule 42(3) of this Court, for leave to file the attached brief as *amici curiae* in support of the appellants. This motion is necessitated by the refusal of the appellee to consent to the filing of this brief.

The interest of the *amici curiae* group is set forth in detail in the brief. To summarize, however, the group is composed of seven small and independent petroleum refiners, firms which are not fully integrated into all four levels of the petroleum industry—crude oil production, refining, transportation, and marketing. The group is primarily engaged in refining and marketing activities and are, therefore, within the class of independent refiner-marketers of whom the trial court found that

> among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such an effect would not be in the interest of the public at large. (App. D, at 130a).

Amici historically have operated in their respective marketing areas predominantly through company owned retail outlets. Only through such private brand marketing can they compete at retail with larger, integrated companies. The current and future business operations of every member of the *amici* group are directly, substantially, and adversely affected by the decision of the court below. If the Maryland Motor Fuel Inspection Law is upheld, it will prevent them from expanding and entering the Maryland retail gasoline market. If the statute is approved and adopted in other states, the group will be forced to cease their operations within those states. A witness for the Federal Trade Commission recently confirmed the impact the statute would have upon independent refiners.

> One problem is that several states—Maryland is a prime example—have enacted so-called marketing divestiture laws which do not require the sale of station premises, but do preclude direct operation of outlets

> by the refiners. Pushed through the legislature by the franchised dealers, such legislation has sometimes had the practical effect of eliminating from state markets the *non-branded* dealers. These price-competitive retail outlets have generally been directly operated by employees of independent refiners. By failing to exempt these smaller refiners, who believe they cannot operate efficiently through a franchise system, these laws are apparently eliminating the very price cutters who most benefit consumers.[1]

Although the interests of the *amici* are basically similar to those of the appellants, there are significant differences in their perspectives as to the effects of this statute on both interstate commerce and the retail gasoline market. First, all of these companies are much smaller in both size and resources than the appellants. Since marketing through a dealer system requires enormous resources to develop brand names, these companies are, to an even greater degree than the appellants, dependent upon the use of company owned and operated stations for their retail sales. Second, unlike the appellants, only one of the *amici* group currently sells gasoline at retail in Maryland. The other companies will, in practical effect, be precluded from entering the Maryland market in the future since the statute prohibits them from operating the company owned retail outlets which represent their only feasible means of competition with brand name products.

The resolution of this appeal will also have important and direct consequences for existing, pending, or contemplated legislation in an additional thirty-eight jurisdic-

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[1] Testimony of Owen M. Johnson, Director of the Bureau of Competition of the Federal Trade Commission, appearing before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources (May 25, 1977), at 8-9 (emphasis in the original).

tions.[2] This Court should have the benefit of being presented with a full discussion of the implications of Maryland's attempt to alter the present structure of the retail gasoline market.

For these reasons, it is respectfully requested that the motion of these independent refiners to file a brief *amici curiae* in support of appellants be granted.

Respectfully submitted,

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[2] *See* Testimony of Owen M. Johnson, *supra*, note 1.

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INTEREST OF AMICI CURIAE

The *amici curiae* here are seven petroleum companies: Charter Oil Company, Clark Oil & Refining Corporation, Derby Refining Company, Hudson Oil Company, Inc., Rock Island Refining Company, Inc., Vickers Petroleum Corporation, and United Refining Company. Each of these companies is a separate corporate entity, organized, existing, and operating in the United States.

Amici are all crude deficient refiners of petroleum who market gasoline at retail through, generally unbranded, company owned and operated retail outlets. United Refining and Hudson Oil, for example, have no crude production. Instead, they refine seventy and eighty percent, respectively, foreign oil which they purchase from uncontrolled sources. Further, Rock Island owns less than one percent of the crude oil that it refines, and Clark Oil owns less than two percent.

Amici have few or no branded dealers. Hudson Oil, for example, operates solely by means of company employees, while Vickers Petroleum markets no more than five percent of its gasoline production through such independent dealers. The predominant means by which these companies market gasoline are sales to wholesale customers for resale at retail and sales through unbranded or branded company-operated stations.

Hudson Oil is currently operating within the state of Maryland. All seven companies which constitute the *amici* here, however, have an interest in this case since the state law under review, if upheld by this Court and adopted in other states, would operate to undermine the economic viability of the entire independent refining sector of the petroleum industry.

The import of Paragraphs B and C of the Maryland Motor Fuel Inspection Law, as amended, (the "Act")[1] is to prohibit petroleum producers and refiners from operating retail service stations located within the state with personnel employed by the company. It requires instead that

[1] Md. Ann. Code, Art 56, §157E (1972 Repl. Vol., 1976 Cum. Supp.).

all retail gasoline outlets be operated by service station dealers. The application of this statute to independent refiners, such as the *amici* group, merits special attention because the trial court expressly found that

> among the experts who testified there was unanimous agreement that in precluding the independent crude-deficient refiners from selling at retail in Maryland, a powerful source of price competition with the branded dealers would be eliminated, the effect of which would be anti-consumer, and that any law which had such an effect would not be in the interest of the public at large. (App. D, p. 130a).

The Maryland Court of Appeals did not disagree with this finding. To the contrary, it acknowledged that the State's expert witness had conceded the Act to be anti-competitive as applied to independent refiners. (App. A, 15a).[2] The reasons underlying these findings and conclusions are rooted in the distinct position which independent refiners occupy in the petroleum industry and, more specifically, in the retail gasoline market.

STATEMENT OF FACTS

Major oil refiners such as appellants Exxon, Gulf, Phillips, and Shell are fully integrated in that they produce the crude oil which their refineries process into refined

[2] References to appendices are to those contained in the joint Appendix filed by Exxon Corporation, the Phillips Petroleum Company, Gulf Oil Corporation, Continental Oil Company and its subsidiary, Kayo Oil Company, Shell Oil Company, Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation.

products and, typically, market their gasoline production under their own brand through a controlled network of franchised dealers. (A. 498, 526-27).[3] In contrast, independent refiners are only partially integrated. Although they are engaged in refining and marketing petroleum products, they produce only a small proportion of the crude oil needed to operate their refineries, and they lack networks of franchised dealers who must purchase their gasoline production from them.[4] Instead, independents purchase most of their crude oil from uncontrolled sources and market a substantial portion of their gasoline through independent marketers who have no contractual ties with them. (A. 498, 526-27).

Lack of control over their raw materials often results in serious competitive disadvantages which independents must overcome to maintain their marketshare and achieve profitability. When, for example, crude oil is in short supply, as it was during the period of the Arab oil embargo, independents must curtail production and suffer increased costs per barrel as fixed costs are spread over reduced production. (A. 501-03).

[3] The designation of "A" is to the appendix jointly filed by all parties to this consolidated appeal.

[4] These characteristics of an independent refiner, which are generally understood in the petroleum industry, have been incorporated into the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751, at §753:

> The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 percentum of his refinery input of domestic crude oil (or 70 percentum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

The problem is equally acute when the cost of crude oil rises rapidly, as it did in 1973 and 1974 in response to price increases by the OPEC cartel. Since independent refiners must purchase crude oil at prevailing market levels, the result of higher costs is to force their refined product prices substantially above the wholesale prices posted by major companies with access to ample crude supplies. Under such circumstances, independent refiners survive only by achieving cost efficiencies in refining and marketing which offset disadvantages stemming from this lack of a controlled source of crude oil.[5]

Selling gasoline at retail through company operated, high volume gasoline-only stations has proved to be an effective and necessary means of adapting to these competitive disadvantages. (A. 357, 450, 455, 503-04, 508, 517). Only in this way can independent refiners secure outlets or "safety valves" for their gasoline production. (A. 527-29, 635-26). If fluctuations in the availability and cost of the crude oil supplies render their wholesale prices uncompetitive with major competitors, they are assured of being able to market at least a portion of their production through their own controlled retail stations. Since these stations generally are unbranded, low-cost "gas-and-go" operations, marketing economies are achieved which can be used to offset disadvantages associated with higher raw

[5] During the "energy crisis" of 1973-74, when both of the problems discussed above were experienced in full force, independent refiners as a class sustained severe economic and competitive injuries. (A. 445-47, 504-05, 514). Their continued viability was preserved only by the passage of emergency legislation under which Congress required major companies to share their crude supplies with independents on an equitable basis and established a cost equalizing mechanism to offset the higher crude costs incurred by independents. In the Emergency Allocation Act of 1973, *supra*, Congress recognized as the appellee's expert witness noted below, that independent refiners were among the "victims" of the fuels crisis because of their crude oil deficiency. *See* 15 U.S.C. §753. *See also* A. 624-25.

material costs. (A. 348-56, 452, 454, 457-58, 506-07, 528-29). Without retail outlets of their own, independent refiners would be forced to curtail production at their refineries when higher costs prevent them from achieving competitive wholesale prices. (A. 505, 527).

Major refiners also have assured retail outlets for their gasoline production. Historically, they have marketed through networks of "dealers" to whom they lease stations under franchise agreements. (A. 526). These agreements require the dealer to purchase his gasoline from his supplier and sell it under the major's brand. In turn, the major furnishes the dealer with national advertising, credit cards, and other assistance in promoting the brand name. (A. 306, 350, 559-60).

Independent refiners are unable to market through branded dealer operations. They lack the enormous resources needed to establish brand recognition. (502-03, 527-28). Also, branded dealer stations typically are full-service stations offering repair services, tires, batteries and accessories, and other customer conveniences. The added costs associated with these services result in higher gasoline prices to the consumer. As discussed above, independent refiners must rely on low-cost, company operated stations where consumers are offered the choice of receiving a discount gasoline price instead of additional services. (A. 356, 370-71, 376-77, 452, 517, 588-89).

The retail gasoline market in Maryland is an accurate reflection of the role of independent refiners in the national petroleum industry. Appellants Ashland Oil, Inc. ("Ashland") and Commonwealth Oil Refining Co., Inc. ("Corco") are crude-deficient independent refiners who operate in Maryland exclusively through company operated, gasoline-only stations which offer prices several cents per gallon below those of full service, dealer stations. (A. 257-58, 451-52, 589). Ashland and Corco purchase

from uncontrolled sources, 85 and 100 percent, respectively, of the crude oil needed for their refineries. (A. 255, 257, 497-98). Both have operated through company owned and operated stations under the private brands of "Redhead", "HiFi" and "Scot", because they have determined that it is the only way they can profitably sell gasoline at retail in Maryland. (A. 258, 449, 502-04, 508, 626). In Maryland, neither company has ever operated through retail dealers. (A. 257, 258, 489).

In addition to retail sales, Ashland and Corco are major wholesale vendors of gasoline to independent marketers who also operate discount gasoline-only stations in Maryland but who do not engage in any production or refining activities. (A. 509, 624)

The trial court found, based on the undisputed testimony of witnesses for Ashland, Corco and the State of Maryland, that retail stations owned and operated by crude-deficient independent refiners are beneficial to consumers because they provide ". . . a powerful source of price competition with granded dealers." (App. D, 130a). Since independent refiners cannot operate their stations through dealers and preserve the high volume, discount marketing strategy which they now employ, the effect of the Maryland Act will be to require them to dispose of their stations and withdraw from the Maryland market. (A. 357-58, 457, 508, 519, 531). The Federal Trade Commission has recently warned against the burdens and market disruptions this withdrawal would cause.

> One problem is that several states — Maryland is a prime example — have enacted so-called marketing divestiture laws which do not require the sale of station premises, but do preclude direct operation of outlets by the refiners. Pushed through the legislature by the franchised dealers, such legislation has sometimes had the practical effect of eliminating from state mar-

> kets the *non-branded* dealers. These price-competitive retail outlets have generally been directly operated by employees of independent refiners. By failing to exempt these smaller refiners, who believe they cannot operate efficiently through a franchise system, these laws are apparently eliminating the very price cutters who most benefit consumers.[6]

The Commission's concerns were echoed by the expert witness called in defense of the Act. He acknowledged that he was "troubled" by the fact that it extended to independent refiners. (A. 590, 623). He said its application to independents was a "negative" feature of the Act because independents are pro-competitive factors in the market. (A. 630, 634-35). He admitted that independents lack the resources to compete unfairly in the marketplace and that their withdrawal from Maryland would reduce competition and the supply of gasoline to independent gasoline marketers. (A. 590). Perhaps most significantly, he also stated that if he had been called upon to draft the Act under review he would have excluded independent refiners from the scope of its prohibitions. (A. 631).

The Maryland Court of Appeals recognized that the State's witness had "conceded that the Act, by excluding certain partially integrated marketers, could in some respects be anti-competitive . . ." (App. A, 15a). That court held, however, without elaboration, that it could not substitute its judgment for that of the Legislature as to why these actors were included within the statutory classification. *Id.*

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[6] Statement of Owen M. Johnson, Director, Bureau of Competititon, Federal Trade Commission, before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources (May 25, 1977), at 8-9 (emphasis in original).

The burdens that would be created by the Maryland Act are identical to those the *amici* would face in other regions of the country if the Act is upheld and adopted in other states. Independent refiners would be forced to dispose of their stations and abandon retail gasoline operations in every state following Maryland's lead. Since their retail outlets are their only protection against fluctuations in crude oil costs, independents would be unable to compete effectively with major companies in the wholesale gasoline market during periods of rising raw material costs. Thus, the future viability of an entire segment of the petroleum industry is threatened by the Maryland Act which, as the trial court expressly found, "is designed to benefit one class of merchant to the detriment of another." (App. D 131a).

ARGUMENT

A. The Maryland Act Imposes A Significant Burden On Commerce.

The Maryland Court of Appeals held that the prohibition of company operation of retail service stations by producers and refiners did not burden interstate commerce because the Act

> would not in any way restrict the free flow of petroleum products into or out of the state. The Act merely regulates a wholly instrastate activity, the retail marketing of gasoline within the state. Producers and refiners would still remain free to import and sell petroleum products to wholesalers and to retail service station dealers. (App. A, 18a-19a).

The Maryland Court's conclusion reflects both an erroneous reading of this Court's precedents and a serious misconception of the facts.

The heart of the Maryland Court's legal position seems to be its view that no state regulation of commerce can infringe upon the Commerce Clause unless its effect is to hin-

der "either the import or export of goods." (App. A, 18a) However, it is well recognized that the Commerce Clause also prohibits regulations which interfere with the "natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976). Regulations which have the practical effect of increasing operating costs, hampering efficiency, and reducing competitive strength are as much a burden on interstate commerce as are direct embargoes on imports or exports. *Hunt v. Washington State Apple Advertising Commission*, __ U.S. __, 97 S.Ct. 2434, 2443-47 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 375, 381 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781-82 (1945).

The record evidence plainly shows that those independent refiners which now market gasoline in Maryland through company operated stations could not continue to do so if the Act is sustained. (A. 357-58, 457, 509, 519). Even if they were somehow able to adjust to the Act's requirements, the added cost of operating through dealers would reduce their competitive effectiveness and thereby discourage them from continuing to distribute gasoline in this hostile regulatory environment. The likely result would be diversion of the gasoline that the independents now supply to Maryland into other states. (A. 508). The Maryland Court's suggestion that "there will be no significant disruption of the flow of petroleum products into the state" (App. A 24a) disregards economic reality.

The Maryland Court seems to believe that the Act would not offend the Commerce Clause if the total volume of goods sold in the State were not reduced. The record demonstrates that some sellers of gasoline would withdraw from the State if the Act is upheld, and that others would

be discourage from entering on the terms imposed as conditions of doing business there. (A. 376-77, 383). There is *no* evidence to suggest that the deficiency created by loss of these present and potential suppliers would be made up by other suppliers. However, even if the Maryland Court's unsupported conjecture is correct, it is legally irrelevant. This Court did not predicate its decisions in such cases as *Du Mond* or *Cottrell* on a finding that the *total* supply of products available in the regulated localities would be reduced, but rather on a finding that *particular* suppliers would be unjustifiably excluded from markets which they were constitutionally entitled to enter.

Equally unavailing is the Maryland Court's suggestion that the Act "merely regulates a wholly intrastate activity, the retail marketing of gasoline within the state." (App. A, 18a). It is scarcely possible to conceive of an activity having more extensive connections with interstate commerce. Every gallon of gasoline which is sold at retail in Maryland is produced and refined elsewhere and transported into the state by common carrier pipelines and other instrumentalities of commerce. The purchasers of these products include not only local residents but also interstate travellers and trucking companies. It is too late in the day to suggest that a business so dependent on interstate movements of supplies, and so vital to interstate customers, is beyond the reach of the Commerce Clause. *Daniel v. Paul*, 395 U.S. 298 (9169); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *F.T.C. v. Sun Oil Co.*, 371 U.S. 505 (1963); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951).

B. The Maryland Act Discriminates Against Interstate Commerce

The precedents of this Court have repeatedly made clear that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977); *Great Atlantic & Pacific Tea Co. v. Cot-*

trell, supra, 424 U.S. at 370; *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327, 330 (1944). As this Court stated in *H.P. Hood & Sons v. Du Mond, supra,* 336 U.S. at 539:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

State regulations which offend that fundamental principal by discriminating against interstate commerce to favor local interests have been stricken down whenever they have been presented for review. *Hunt v. Washington State Apple Advertising Commission, supra; H.P. Hood & Sons v. DuMond, supra; Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Baldwin v. G.A.F., Inc.,* 294 U.S. 511 (1935);- *Buck v. Kuykendall,* 267 U.S. 307 (1925). This result has followed even when the discrimination has not been apparent on the face of the statute, *Nippert v. City of Richmond, supra,* 327 U.S. at 431, since the occasions are rare when a state would "artlessly disclose an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951). The test of discrimination is not what the state claims it is doing but rather whether the "practical effect" of the legislation is to place interstate traders at a disadvantage in competing for business against local interests. *Hunt v. Washington State Apple Advertising Commission, supra,* 97 S.Ct. at 2445; *Nippert v. City of Richmond, supra,* 327 U.S. at 431; *Dean Milk Co. v. City of Madison, supra,* 340 U.S. at 354.

The Maryland Court found that "the Act does not in effect discriminate against out-of-state economic interests as opposed to local interests" because it "is equally applicable

to all producers and refiners." (App. A 19a). This is a strange conclusion in view of the court's acknowledgement that some refiners market in Maryland exclusively through company owned stations, and that these companies — unlike the major oil companies which distribute primarily through dealers — would be required to adopt a distribution method which their management believed was impossible. (App. A 23a). The Act is, of course, "equally applicable" to all refiners, but the result of its application is not equal. Some refiners — the independents — will be prevented from marketing in the State by means of the only distribution method available to them, while others — the majors — may continue to engage in their customary marketing techniques.

The fact that all refiners, whether major or independent, are "out-of-state", with the result that discrimination at the refining level is between classes of interstate competitors rather than between local and interstate refiners, should make no difference. The freedom protected by the Commerce Clause "is a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Commission, supra,* 429 U.S. at 335. This freedom is denied here to independent refiners, but not to the major oil companies with whom they compete. This form of discrimination as much offends the Commerce Clause as does the more common form of discrimination in favor of local interests, because it interferes "with the natural functioning of the interstate market." *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 806.

The basic flaw in the Maryland Court's analysis was its assumption that the conflict was between out-of-state refiners and non-existent "local" refiners. The real conflict here is between the local dealers who operate major brand service stations and the independent refiner-marketers who compete with them *at the retail level.* The

record shows that the stations operated by independent refiners provide an important source of retail price competition for the dealer operated major brand stations. This competition will be eliminated by the Act. The beneficiaries will not be the Maryland consumer or the interstate travellers who purchase gasoline within the State, but the dealers who seek this business for themselves. A more palpable case of discrimination against interstate sellers and purchasers in favor of local interests can scarcely be imagined.

This Court observed in *Nippert v. City of Richmond, supra*, 327 U.S. at 434, that taxes levied against itinerant salesmen "lend themselves peculiarly" to creating discriminations against interstate sellers in favor of local merchants, and that "this is often if not always the object of the local commercial influences which induce their adoption." More recently, this Court found it "somewhat suspect" that a North Carolina ordinance respecting the labelling to be used for containers in which apples were shipped had been adopted in response to pressures from local growers. *Hunt v. Washington State Apple Advertising Commission, supra*, 97 S.Ct. at 2446.

What was only suspected in *Nippert* and *Hunt* is clearly evident in this case. The principal proponent of the Act before the Maryland legislature was the Greater Washington/Maryland Service Station Association, whose representative testified that there was a need to protect the 700 Maryland dealers represented by this association from "company operated 'Gas and Go' outlets which sell gasoline only with no service to the motorist." (A. 758).[9]

[9] Dealer organizations have also supplied the primary impetus for the enactment of divestiture statutes in other states. *See* Statement of Owen M. Johnson, Jr., Director, Bureau of Competition, Federal Trade Commission, commenting on H.R. 130 and related bills, before the Subcommittee on Energy and Conservation of the Senate Committee (continued)

Other pressures were brought to bear by local wholesalers, who had been included in the original bill sent to the Legislature by the Governor. (A. 723-26). The result was a divestiture provision which excluded wholesalers,[10] and provided that all Maryland stations supplied by producers or refiners "must be operated by a retail service station dealer." These facts, coupled with the obvious competitive advantage flowing to dealers from elimination of the lower priced refiner operated "gas-and-go" outlets, leave no doubt that the purpose and effect of the Act was to benefit local merchants at the expense of their out-of-state competitors.

C. The Act Is Not Justified By Any Legitimate State Interest.

When discrimination against interstate commerce has been demonstrated, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission, supra*, 97 S. Ct. at 2446. *See also Great Atlantic & Pacific Tea Co. v. Cottrell, supra*, 424 U.S. at 371-72; *Pike v. Bruce*

[9](Continued)
on Energy and Natural Resources (May 25, 1977) at 8-9; Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1307 (1975).

[10] The draftsman of the bills testified he had included wholesalers so as "not to discriminate against one class as to another." He could not explain why the wholesalers had been eliminated by amendment, but did say he had "heard" the reason was that "some of the wholesalers being local jobbers . . . wanted to plea upon the mercy of the committee so to speak and amend themselves out . . . . " (A. 568). It thus appears that the Legislature's decision to exclude wholesalers was also the product of the kind of "local commercial influences" referred to in *Nippert*.

Church, Inc., supra, 397 U.S. at 142; *Dean Milk Co. v. City of Madison, supra*, 340 U.S. at 354. This burden is especially great when the interest asserted is unrelated to the protection of health and safety, because promotion of local economic interests is permissible only if there is no undue discrimination against out-of-state interests. *H.P. Hood & Sons v. Du Mond, supra*, 336 U.S. at 531-32.

The Maryland Court concluded "[t]here is every indication that the purpose of the statute was to preserve competition within the retail gasoline marketing industry in Maryland." (App. A, 19a). It based this conclusion on certain evidence offered to the Legislature which tended to show that "company operated stations received greater allocations of gasoline during a period of shortage than did dealer operated stations" and that "the oil companies intended to increase the number of company operated stations." *Id.* The court made no findings of its own, because it appeared to believe the only issue was whether the Legislature could rationally conclude that the regulation was needed to preserve competition.[11] It also failed to consider whether the divestiture remedy selected by the Legislature bore any relationship in fact to the "evils" it wished to correct.

The most striking feature of the Court's analysis in this regard was its total failure to relate the assumed legislative objectives to independent refiners. All of the reasons given for adoption of the Act relate to the major oil companies, which market primarily through contractual arrangements with dealers. Independent refiners have no dealers to terminate unfairly or to discriminate against in the allocation of supplies. It is thus apparent that the purported objective of protecting dealers from unfair manipulation by their

[11] This assumption is erroneous. The determination of the validity of a statute under the Commerce Clause cannot be based solely on this issue. *See City of New Orleans v. Dukes*, 427 U.S. 297, 304 n. 5 (1976); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959).

suppliers cannot be offered as a reason to require independent refiners to cease company operations of their retail stations.

The Maryland Court concluded, somewhat ironically, that the prohibition against company operated stations was needed to prevent control of the retail market "by a few major oil companies." (App. A, 19a). The actual effect of the requirement, however, will be to accelerate that control by excluding the only real competition the major oil companies have.

The trial court found, on the basis of the record evidence, that exclusion of independent refiners would eliminate "a powerful source of price competition with the branded dealers . . . , the effect of which would be anti-consumer." (App. D, 130a). The trial court also found "[t]here was no proven detrimental effect upon the retail market caused by company-owned-and-operated stations which could not be curbed by federal and state anti-trust laws." (App. D, 130a). The Court of Appeals did not disagree with those findings.

The burdens imposed upon independent refiners by the Act cannot be said to be merely incidental effects of otherwise appropriate legislation. These burdens amount to a complete prohibition of operations by these interstate companies in Maryland. Such a result is "clearly excessive in relation to the putative local benefits" advanced in favor of the Act. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

CONCLUSION

For the reasons stated, the judgment of the Maryland Court of Appeals upholding Paragraphs B and C of the Maryland Motor Fuel Inspection Law should be reversed.

Respectfully submitted,

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